No. 87-1535

In The
Supreme Court of the United States
October Term, 1987

—o—

JOHN HANCOCK VARIABLE LIFE INSURANCE COMPANY,

Petitioner,

v.

LOIS ANNETTE PIERCE,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

—o—

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QUESTION PRESENTED

The law of the State of Alabama provides for an award of punitive damages in civil proceedings against the principal for the fraudulent acts of its agent on a civil standard of proof based on the reasonable satisfaction of the jury. The question presented is whether the award of punitive damages in civil proceedings in Alabama against the principal for the fraudulent acts of its agent on such civil standard of proof violates the Constitution of the United States, Amendments V, VI and XIV.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

—o—

John Hancock Variable Life Insurance Company (hereinafter "John Hancock") petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

—o—

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 1a-12a) is reported at — So.2d —, 21 ABR 5060

(Alabama Bar Reporter). There was no opinion from the Circuit Court of Mobile County, Alabama, only the judgment entered on the docket upon receipt of the jury verdict.

JURISDICTION

The judgment and opinion of the Supreme Court of Alabama (App., *infra,* 1a-12a) was entered on September 25, 1987. John Hancock filed a timely application for rehearing pursuant to Rule 40 of the Alabama Rules of Appellate Procedure on October 8, 1987, and the judgment and opinion of the Supreme Court of Alabama (App., *infra,* 13a-15a) was entered on December 11, 1987 and reported at — So.2d —, 22 ABR 492. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of the Constitution of the United States are set out in the Appendix (App., *infra,* 16a-17a).

STATEMENT

1. A $200,000 policy of life insurance, naming Lois Annette Pierce (hereinafter "Mrs. Pierce") as the beneficiary, was issued by John Hancock[1] to Glen D. Pierce (hereinafter "Mr. Pierce"), with an effective date of April 6, 1983. (Clerk's Record [hereinafter "CR"], p. 162; Reporter's Transcript [hereinafter "RT"], p.4). The application for that policy included a portion, Part B, entitled "Statements to the Company's Medical Examiner." (CR, p.181; RT p.4). On April 22, 1983, Dr. H. V. Allen, a family practitioner in Mobile, asked Mr. Pierce the questions listed on that portion of the application, and wrote down his responses thereto. Mr. Pierce then signed the "Statements to the Company's Medical Examiner". (RT, p.158, 159).

Mr. Pierce died on August 7, 1983 of an acute myocardial infarction. (CR, p.189; RT, p.4). Ms. Elinor Pangborn acted for John Hancock to review the claim for the proceeds of the policy made by or for Mrs. Pierce. (RT, p.191). Ms. Pangborn noted that, according to his death certificate, Mr. Pierce had been treated by Dr. McAtee at the time of his death and that he died only 4 months after the effective date of the policy. (RT, pp.193-194). She therefore requested records from Dr. McAtee which re-

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[1] John Hancock Variable Life Insurance Company has as its affiliates John Hancock Mutual Life Insurance Company, Independence Investment Associates, Inc., John Hancock Venture Capital Management, Inc., John Hancock Financial Services, Inc., John Hancock Advisors, Inc., HANSECO, Insurance Company, John Hancock International Services, S.A., Profesco Corporation, Tucker Anthony Holding Corporation, John Hancock Realty Services Corp. and Hancock/Dikewood Services, Inc.

vealed that Mr. Pierce had been treated for alcoholism, chest pain, lung disease, and had a history of asthma. (RT, pp.194-198).

Because these conditions were not revealed on the application as filled out by Dr. Allen, Mrs. Pangborn requested an opinion from a company physician as to whether the policy would have been issued if the conditions had been revealed. (RT, p.196). She received a response that the policy would not have been issued as applied for and she therefore denied the claim for the proceeds on the basis of the misrepresentations in the application. (RT, pp.197-198).

2. On November 9, 1983, Mrs. Pierce commenced this action in the Circuit Court of Mobile County, Alabama against John Hancock and its soliciting agent, Curtis Bullock (hereinafter "Bullock"), for recovery of the proceeds of the $200,000 insurance policy on the life of Mr. Pierce, plus punitive damages. The complaint (CR, p.1) contained three theories of recovery against John Hancock: breach of contract, fraud allegedly committed by its soliciting agent, Bullock, in soliciting the application, and bad faith refusal to pay.

By way of amended answer (CR, p.41), John Hancock asserted that an award of punitive damages against it would be a violation of the Constitution of the United States.

The trial court entered summary judgment in favor of John Hancock on Mrs. Pierce's bad faith claim, and the case was tried solely on the two remaining theories, breach of contract and the fraud of Bullock for which John Hancock might be liable.

John Hancock moved for a directed verdict of dismissal as to the claim for punitive damages on the fraud claim at the close of all the evidence on the ground that the claim for punitive damages was barred by the Constitution of the United States. (RT, p.320). This motion was denied and the trial court instructed the jury that it could award punitive damages against John Hancock based on the fraud of its soliciting agent, Bullock pursuant to a civil standard of proof based on the "*reasonable satisfaction*" of the jury. (RT, p.329). John Hancock timely objected to these instructions. (RT, p.339).

At trial, the evidence was in dispute as to whether Mr. Pierce misrepresented his condition to Bullock or Bullock misrepresented Mr. Pierce's communicated medical problems on the application forwarded to John Hancock and made the basis of the life insurance contract. However, there was absolutely no evidence that John Hancock itself, nor any of its employees or other agents, engaged in any fraudulent conduct. Bullock is not an employee of John Hancock, and his relationship with John Hancock was set forth in his sales representative contract "*as an independent contractor.*" (CR, p.262; RT, p.4).

The jury returned a verdict in favor of John Hancock on the contract claim and against John Hancock and Bullock on the fraud claim in the amount of $350,000. Inasmuch as the only damage proved on the fraud claim was the loss of the policy, the remaining $150,000 can only have been based on punitive damages. The jury was instructed that it could impose punitive damages on John Hancock based solely on the action of its soliciting agent, Bullock. (RT, pp.328-329, 334). John Hancock timely filed a motion for judgment notwithstanding the verdict

(CR, p.110), reasserting the issues herein, which was denied by the trial court.

3. The Supreme Court of Alabama affirmed in part and remanded in part the judgment in favor of Mrs. Pierce and against John Hancock. (App., *infra*, 1a-12a). The remand dealt with the state law requirement that the trial judge issue written findings on whether the verdict of the jury was excessive. (App., *infra*, 5a-6a).

In affirming the judgment of the trial court (App., *infra*, 1a-12a), the Supreme Court of Alabama noted John Hancock's contention that the award of punitive damages in civil proceedings in Alabama violates the Constitution of the United States, but inexplicably failed to address that issue in its opinion.

John Hancock timely filed an application for rehearing, again requesting the Supreme Court of Alabama to address this issue raised herein. On December 11, 1987, the Supreme Court of Alabama denied the application for rehearing. (App., *infra*, 13a-15a).

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REASONS FOR GRANTING THE PETITION

The procedures for the award of punitive damages in Alabama permit the entry of a judgment against a defendant without any limit on the amount nor any guide in setting the amount. Punitive damages as awarded in civil proceedings in the State of Alabama clearly are penal in nature, though the conduct of the party against whom punitive damages are imposed is not judged by a penal

standard of proof. Moreover, the judgment imposing liability for punitive damages may be based on the wrongful conduct of an agent, though the actions of the agent are a willful departure from the scope of his authority.

This Court specifically reserved opinion on the issue of punitive damages as awarded in Alabama in *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), and John Hancock respectfully submits that this is an appropriate time to address the constitutional ramifications of awards of punitive damages in Alabama.

Merely because a proceeding is denominated as "criminal," defendants facing penalties far less than that imposed on John Hancock in this case are afforded procedural safeguards under the Constitution of the United States.

In *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51, 99 S.Ct. 2121, 60 L.Ed.2d 743 (1979), Justice Marshall pointed out that punitive damages are unpredictable windfalls which might be "employed to punish unpopular defendants." Whoever Justice Marshall may have had in mind, today in Alabama insurance companies are the unpopular defendants. These unpopular defendants all the more need the procedural protections of the Constitution of the United States.

1. The issue of the constitutionality of punitive damages is presently before this Court in *Bankers Life & Casualty Company v. Crenshaw*, No. 85-1765 on appeal from the Supreme Court of Mississippi, which has already been briefed and argued. John Hancock avers that a writ

of certiorari should be issued to the Supreme Court of Alabama to, if nothing else, preserve the issue herein pending this Court's opinion in *Bankers Life*. To the extent appropriate, John Hancock submits that the constitutional issues raised herein are such that the petition, once granted, could be stayed pending the decision of this Court in *Bankers Life*, or the cases consolidated for reargument or other appropriate action by the Court.

2. In Alabama, a jury is empowered to award punitive damages which are equivalent to a criminal punishment, but the defendant who is subjected to this punishment has none of the safeguards which are guaranteed under criminal procedures by the Constitution of the United States.

In Alabama, a trial court instructs the jury that it is authorized "*to award punitive damages*" if "*it is shown to the reasonable satisfaction of the jury by the evidence that the fraud was malicious, oppressive or gross or a misrepresentation made with knowledge of its falsity or so recklessly done as to amount to the same thing and committed with intent to injure and to defraud*" (RT, p.329), but a trial court does not instruct the jury as to any measure or standard by which the jury should determine the amount of such punitive damages, if it were to award them.

Alabama juries are instructed that the amount of punitive damages should be based on the "*character and degree of wrong*" and the necessity of "*preventing similar wrongs*". *Alabama Pattern Jury Instructions* § 11.03. As this Court has stated:

> If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal.

Trop v. Dulles, 356 U.S. 86, 96, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (Warren, C.J.) (plurality opinion).

Being penal in nature, punitive damages differ radically from compensatory damages. The latter obviously are intended to compensate the injured party, while the former is assessed for the benefit of all and to punish the wrongdoer. Yet this "*wrongdoer*" is not entitled to the very due process constitutional safeguards afforded any other wrongdoer which violates the law and is fined or punished in a criminal proceeding.

The due process clauses contained in the Constitution of the United States, Amendments V and XIV prohibit the State of Alabama from depriving John Hancock of property without due process of law. This Court has often stated that a state, such as Alabama, must provide fundamentally fair proceedings which guarantee John Hancock "*the opportunity to present* [*its*] *case and have its merits fairly adjudged.*" *See Lassiter v. Department of Social Services,* 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). The state is required to satisfy due process when it takes property or when its enforcement power is used to require transfer of property between litigants. *See North Ga. Finishing, Inc. v. Di-Chem.,* 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). *See generally* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 Va.L.Rev. 269, 276-277 (1983)

The safeguards of criminal procedure guaranteed by the Constitution of the United States are simply not available under Alabama civil procedures as concern the imposition by the jury of punitive damages. For example, a criminal defendant *"shall [not] be compelled in any criminal case to be a witness against himself". Constitution of the United States Amendment VI.*

In civil actions, however, a defendant subjected to possible punitive damages is subjected to extensive obligations to provide evidence against itself to its opposing party. *See Alabama Rules of Civil Procedure (hereinafter "Rules"), Rules* 26-37. Moreover, a party's failure to comply with discovery requests or orders enforcing discovery requests may be subjected to sanctions, including the entry of a judgment by default. *See Rule* 37(b)(2).

Additionally, criminal defendants may not be prosecuted twice for the same offense, *see Constitution of the United States, Amendment V,* but a defendant in Alabama civil proceedings has unlimited exposure to punitive damages to several victims of the same act.

Of even more significance is the varying standards of proof between penal or criminal actions and civil proceedings. To establish the guilt of a criminal defendant, the prosecution must prove the elements of the crime meriting punishment "beyond a reasonable doubt", *Reliance Insurance Company v. Substation Products Corporation* 404 So.2d 598, 603 (Ala. 1981); *Guenther v. State,* 282 Ala. 620, 213 So.2d 679, 683 (Ala. 1968), *cert denied,* 393 U.S. 1107, 89 S.Ct. 916, 21 L.Ed.2d 803 (1869); while in a civil claim for punitive damages the plaintiff recovers if the jury is merely "reasonably satisfied from the evidence", *U-Haul*

Co. of Alabama v. Long, 382 So.2d 545, 548 (Ala. 1980); *Edwards v. Sentell*, 208 So.2d 914, 916 (Ala. 1968); which in Alabama has been based upon a mere "scintilla" of evidence, *American Pioneer Life Insurance Company v. Sandlin*, 470 So.2d 657, 668 (Ala. 1985); *Kennedy Electric Co. v. Moore-Handley, Inc.*, 437 So.2d 76, 80 (Ala. 1983).

Moreover, and of great importance, defendants in criminal prosecutions are entitled to certainty in the definition of the crime of which they are accused. *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (*"courts must decline to impose punishment for actions that are not 'plainly and unmistakeably proscribed'"*); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

Yet, conduct which permits the imposition of punitive damages in Alabama is far from certain, especially in the context of an action for fraud. *See generally*, Commentary, *Punitive Damages and Fraud: Alabama's Deceptive Standard*, 35 Ala.L.Rev. 101 (1984) ("it is 'virtually impossible to determine what the standard is at any given time'").

Finally, criminal penalties which are uncertain in amount are unconstitutional and unenforceable. *United States v. Evans*, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948). Under Alabama procedure, juries assessing punitive damages are merely instructed that the amount should be based on the "character and degree of wrong" and the necessity of "preventing similar wrongs". *See Alabama Pattern Jury Instructions*, § 11.03.

3. The conduct on which Mrs. Pierce based her fraud claim is conceivably a crime in Alabama (*see Ala. Code*

§§ 27-1-12 and 27-12-23 concerning fraudulent statements "*in, or relative to, an application for insurance*"), *punishable* by a maximum fine of $1,000 upon conviction in a criminal proceeding. (App., *infra*, 18a). In this case, John Hancock has been subjected to a penalty or punishment 150 times that maximum, and the award of punitive damages could have varied widely based on the particular jury seated at a particular trial.

The constitutional protections afforded by the Constitution of the United States, Amendments V, VI and XIV are designed to assure that those persons whom the government deems should be punished for wrongful acts, and whose punishment should deter others from engaging in similar wrongful acts, shall not have its property taken without due process of law. *See generally*, Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va.L.Rev. 139 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va.L. Rev. 269 (1983). John Hancock has been punished through the assessment of $150,000 of punitive damages by a jury empaneled by and under the authority of the State of Alabama. Its penalty, not specified as a result of identifiable conduct nor in amount, was assessed against John Hancock on the basis of actions undertaken by one not its employee, but presumably its soliciting agent, such that John Hancock is being punished or penalized for the acts of another who allegedly engaged in fraudulent conduct.

If John Hancock is to be punished, and the wrongful conduct in issue imputed to it, then certainly if the phrase "due process of law" is to fully represent the constitutional protections which those four words comport, then

John Hancock must be adjudged on a standard of proof commensurate with the penal nature of the punishment it receives, a standard of proof based on the criminal concept in Alabama of "beyond a reasonable doubt" or, as argued by the commentators, at least "clear and convincing evidence." *See* Wheeler, *supra* at 296-298.

———o———

CONCLUSION

For the reasons stated above, John Hancock asserts that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1987

John Hancock Variable Life
Insurance Company

85-722 v.

Lois Annette Pierce

Curtis Bullock

85-745 v.

Louis Annette Pierce

Appeals from Mobile Circuit Court

PER CURIAM.

These are consolidated appeals by the defendants, John Hancock Variable Life Insurance Company ("John Hancock") and Curtis Bullock, from a judgment for the plaintiff, Lois Annette Pierce, in plaintiff's action based upon breach of contract and fraud.

85-722 & 85-745

The action arose out of the issuance of a $200,000 policy of life insurance by John Hancock to Glen D. Pierce, naming his wife, Lois Annette Pierce, as beneficiary.

The policy was solicited by Curtis Bullock, a sales representative for John Hancock. In 1981, prior to the transaction in question, Bullock had sold the Pierces a contract providing group health insurance. In connection with the application for the health insurance, Mr. Pierce

represented that he was in good health, had not experienced an illness or been attended by a physician within the preceding five years, and had not suffered from heart trouble, high blood pressure, or a number of other diseases or illnesses.

In April 1983, Bullock met with the Pierces in connection with a policy of life insurance. The testimony concerning the content of the discussion that took place at the time is conflicting. According to Bullock, Pierce denied having had any major health problems and past periods of hospitalization and of his treatment for alcoholism. According to Mrs. Pierce, Bullock's response was that if the problems were all cleared up, Mr. Pierce did not have to mention it to anyone else, that "what John Hancock didn't know wouldn't hurt them."

During the course of a medical examination of Mr. Pierce, he was asked a number of questions by the examining physician regarding his health and medical history. Specifically, he was asked whether he had been treated for alcoholism, heart trouble, arthritis, or had had any checkups, consultation, illness, injury, surgery, etc. Mr. Pierce answered these inquiries in the negative; however, it was established at trial that Pierce had had a prior history of bad health. He suffered from arthritis; he had been hospitalized in 1980 for chest pains; he had been diagnosed as having cervical and lumbar osteoarthritis; he suffered from high blood pressure; and he had been treated for alcoholism.

Four months after the issuance of John Hancock's life insurance policy to him, Mr. Pierce died of a heart attack. When John Hancock refused to pay the policy amount,

Mrs. Pierce brought this action. John Hancock answered with a general denial, averred that the complaint failed to state a proper claim in fraud, and sought a rescission of the policy for misrepresentations or incorrect statements contained in the application. Curtis Bullock defended with a general denial.

The case was tried to a jury on the contract and fraud counts. At the close of plaintiff's case and at the close of all the evidence, both defendants moved for directed verdicts on each count. These motions were denied, and the case was submitted to the jury on both counts. The jury returned a verdict against both Bullock and John Hancock on the fraud count and assessed damages in the amount of $350,000. The defendants' post-trial motions for judgment notwithstanding the verdict or new trial were denied, and this appeal followed.

The defendants have presented the following contentions on this appeal:

> "The award of punitive damages in civil proceedings in Alabama violates the constitution of Alabama and the constitution of the United States.
>
> "The trial court applied the wrong standard of proof in submitting the fraud claim to the jury.
>
> "There was insufficient evidence of reasonable reliance by Mrs. Pierce on the alleged fraud.
>
> "There was insufficient evidence to impute Mr. Bullock's alleged misrepresentation to John Hancock Variable Life Insurance Company.
>
> "There was insufficient evidence to support an award of punitive damages."

The elements of an action in fraud, as required under the provisions of Code of 1975, § 6-5-101, are stated in *Bowman v. McElrath Poultry Co.*, 468 So.2d 879, 880 (Ala. 1985):

> "(1) misrepresentation of a material fact; (2) made willfully to deceive, or recklessly without knowledge; (3) acted upon by the opposite party; and (4) reliance by the complaining party which was justifiable under the circumstances."

Mrs. Pierce did not bring this action in a representative capacity; thus, she was not proceeding to recover damages for her late husband or his estate, and there is no evidence of any action, based upon fraud in the *procurement* of the policy, having been filed by Mr. Pierce before he died. See *Myers v. Geneva Life Ins. Co.*, 495 So.2d 532 (Ala. 1986). A tort claim by him, therefore, would not have survived in favor of his personal representative. Code of 1975, § 6-5-462; *Gillilan v. Federated Guaranty Life Ins. Co.*, 447 So.2d 668 (Ala. 1984).

Mrs. Pierce did bring this action in her individual capacity to recover for a fraud practiced upon her. Accordingly, it was incumbent upon her to prove the elements of a cause of action in fraud as set out above. In *Ames v. Pardue*, 389 So.2d 927, 931 (Ala. 1980), this Court stated:

> "It is fundamental that the representee who relied on the defendant's misstatement and the plaintiff who was injured must be one and the same. The representee must have relied on and have been deceived and damaged by the statement. *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 So. 59 (1896). Recovery cannot be had unless plaintiff relied on the fraudulent

representations of defendant. *Jordan v. Pickett*, 78 Ala. 331 (1884)."

The alleged misrepresentations made to Mrs. Pierce were those of Bullock, who, upon learning of Mr. Pierce's various medical conditions, is alleged to have stated that if these conditions were all cleared up, Mr. Pierce did not have to mention it to anyone else, and that "what [John Hancock] didn't know wouldn't hurt them." The facts in *North Carolina Mutual Life Ins. Co. v. Holley* [Ms. 84-1211 & 84-1223, September 18, 1987] — So.2d — (Ala. 1987), are similar to the facts in this case, and the principle of law applied in that case is controlling here. In *North Carolina Mutual*, Watts, the agent, told the plaintiff in her presence and in the presence of the insured that he had an insurance policy for the insured with *"No medical questions asked"* and also told the plaintiff Holley "Mattie, you'll be the beneficiary of this policy if anything happens to Pat to help with funeral expenses." (Emphasis added.) Watts did not tell the insured or the plaintiff that good health was necessary in order for one to be insured under the policy, because, he said, the company assumed she was in good health. This Court held in *North Carolina Mutual* that the statement made by Watts constituted a misrepresentation on which an action for fraud could be based.

Likewise, on the authority of *North Carolina Mutual*, we affirm the judgment in regard to liability and remand the case for a determination of the question whether the verdict of the jury was excessive.

See *North Carolina Mutual Life Ins. Co. v. Holley*, — So.2d at —, where we said:

The last issue we address is North Carolina Mutual's claim that the verdict was excessive.

"We do not, at this time, decide this issue, but we remand the cause to the trial court to review its judgment in accordance with the guidelines set out in our recent decisions in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Harmon v. Motors Insurance Corp.*, 493 So.2d 1370 (Ala. 1986); and *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Griffin*, 493 So.2d 1379 (Ala. 1986).

"The trial court, in its discretion, may or may not order a further hearing to reconsider the claim that the verdict is excessive. In any event, the trial court is directed to report its findings and conclusions within 28 days of this opinion."

AFFIRMED, IN PART; REMANDED WITH DIRECTIONS.

Jones, Almon, Shores, and Adams, JJ., concur.

Maddox, J., concurs specially.

Torbert, C. J., Beatty, Houston, and Steagall, JJ., dissent.

MADDOX, JUSTICE (Concurring specially).

I concur in the opinion insofar as the liability aspect of the opinion is concerned. I concur in the result to remand the case, but I call attention to my special concurrence that I filed in *North Carolina Mutual Ins. Co. v. Holley, supra.*

85-722 *John Hancock Variable Life v. Pierce*

BEATTY, JUSTICE (dissenting).

I respectfully dissent. I would reverse the judgment on the merits, because I do not feel that the plaintiff proved the element of reliance.

Mrs. Pierce conceded that she paid no attention to the statements Bullock made at the time the application was executed and that Mr. Pierce knew that questions would be asked of him in a medical examination. In fact, during cross-examination, Mrs. Pierce answered in this way:

"Q. Did Curtis [Bullock] tell you that if anybody asked Mr. Pierce whether he had any dizziness, fainting, convulsions, headaches, speech defect, paralysis or stroke, mental or nervous disorder on behalf of John Hancock that he could say no?

"A. Well, he didn't say that. He said if—he didn't say—

"Q. Did he say no?

"A. No, he didn't say that.

"Q. Did Curtis say that if anybody on behalf of John Hancock asked Mr. Pierce about soundness [sic] of breath, asthma, he could say no?

"A. He never—he never said anybody would even ask from John Hancock cause he said he was John Hancock.

"Q. You having trouble answering my questions? Maybe let me repeat it again. Did Curtis say to you—

"A. I'm sorry.

"Q. —or to Glen Pierce in your presence, Glen, if anybody on behalf of John Hancock, anybody else besides me asks you about shortness of breath, persistent hoarseness, cough, blood spitting, even though a truthful answer would be yes, you can say no?

"A. Well, he didn't—I didn't hear him tell Glen that.

"Q. You didn't hear him tell him that. Did Curtis Bullock ever say to you or to Glen Pierce in your

presence that if anybody on behalf of John Hancock asks Mr. Pierce about chest pain, that he could say no even though it was truthful to [say] yes?

"A. Well, I didn't hear him ask Glen. I wasn't with Glen every time he talked to Curtis, so I don't know.

"Q. Did you ever hear—

"A. No.

"Q. I tell you what. I get confused sometimes in the middle of a trial. Let me ask you the question again. Maybe I said it wrong. Did Mr. Bullock in your presence, or, to Mr. Pierce or to you—see, I can see why you're confused. Even I'm confused with my question. Let me start over. Did Mr. Bullock say to you or to Mr. Pierce in your presence that if somebody from John Hancock asks you about chest pain, you can say no, even though the answer is yes.

"A. I didn't hear him say that.

"Q. Okay. Did Mr. Bullock say to you or to Mr. Pierce in your presence that if somebody from John Hancock asks him about prostrate, he could say no, even though the truth was yes?

"A. I didn't hear him say it.

"Q. Okay. Did anybody—did Mr. Bullock ever say to you or to Mr. Pierce in your presence that if somebody from John Hancock asks him about rheumatism, arthritis, disorder of the muscles or bones, that he could say no if a truthful answer was yes?

"A. I never heard him say that if anybody called from John Hancock. I don't know.

"Q. Did Mr. Bullock ever say to your husband or to you—I'm sorry—to you or your husband in your presence that if anybody from John Hancock asks him about tumors, that he could say no even though the truth was yes?

"A. I don't—I never heard him say that if anybody called from John Hancock on any of the questions.

"Q. So, your understanding was when you finished talking to Mr. Bullock about all these applications that *you and Mr. Pierce still had to tell the truth?*

"A. *Oh, sure, yes.*

"Q. Now, let's look at this up here. This is a copy of [an] application that Dr. McAtee will testify was filled out in his presence.

MR. BEDSOLE: Dr. who?

MR. HARDIE: Sorry, Dr. Allen.

MR. BEDSOLE: You are confused. Go ahead.

"MR. HARDIE: I'm really young.

"Q. Dr. Allen, and here's this question, Two, ever been treated for any known indication of Two C, shortness of breath, persistent hoarseness, cough, blood spitting, bronchitis, pleurisy, asthma, emphysema, tuberculosis, or chronic respiratory disorder. If that question were asked about your huband, the truthful answer would be yes, wouldn't it?

"A. Yes.

"Q. But down here we have an 'X' in the no, don't we?

"A. Yes, it shows it.

"Q. Ever been treated for any known indication of chest pain, palpitation, high blood pressure, rheumatic fever, heart murmur, heart attack, or other disorder of the heart or blood vessels, the truthful answer to that would have been yes; isn't that correct?

"A. That's right.

"Q. But this shows no; isn't that correct?

"A. That's correct.

"Q. To E, jaundice, intestinal bleeding, ulcer, hernia, appendicitis, colitis, diverticulitis, hemorrhoids, recurrent indigestion or other disorder of the stomach, intestines, liver, or gallbladder, and I understood you to say that a truthful answer to that would have been yes?

"A. Yes, but it looks like he's got it marked twice.

"Q. Well, there's an 'X' under yes and a line under no. Sure enough to put you on notice to ask that; isn't it?

"A. Yes, I can't understand why John Hancock, didn't write to Dr McAtee. He could have found out everything.

"Q. Well, be fair to me and you'll answer my questions.

"A. Yeah.

"Q. All right. To H, have you ever been treated for any known indication of neuritis, sciatica, rheumatism, arthritis, gout, disorder of the muscles or bones, including the spine, back or joints, truthful answer to that would have been yes.

"A. That's right.

"Q. And what seems to be no is marked here. And the same about J, disorder of the skin, lymph glands, cyst, tumor, or cancer, truthful answer to that would have been yes, but no seems to be marked here. Now, did you and Mr. Bullock and Mr. Pierce get together and work up some kind of scheme where you could go ahead and lie to John Hancock?

"A. Oh, no, no.

"Q. It was never your understanding after you talked with Mr. Bullock that if Dr. Allen asked those questions that Mr. Pierce could lie?

"A. He didn't tell him—he told him that he had, if he was all cleared up these—if he was all cleared up, that was all that mattered; that he didn't have any more of these problems, and that was all that mattered.

"Q. So, Mr. Bullock was assuring your husband that if everything was cleared up, he'd probably get the policy, wasn't he?

"MR. PARTRIDGE: Object to the form of the question.

"THE COURT: Overrule.

"Q. But Mr. Bullock didn't tell your husband or you that Mr. Pierce could lie when Dr. Allen asked him questions, did he?

"A. He said that, that *if he was all cleared up, there was no point in discussing it.*

"Q. Do you have trouble answering that question? He did or he didn't tell you to lie?

"A. He didn't, he didn't tell—I didn't hear him tell my husband one way or the other.

"Q. Did you hear him tell your husband to lie?

"A. I didn't hear him tell him anything.

"Q. Did you understand—you, Mrs. Pierce—is there anything in any of your conversations with Mr. Bullock that led you, Mrs. Pierce, to believe that your husband should lie?

"A. No." (Emphasis added.)

By her own testimony, Mrs. Pierce conceded that she paid no attention to those statements, that she knew her husband would undergo a medication examination before the policy was issued; that she knew that her husband would have to tell the truth in connection with his insurance ap-

plication; and that there was nothing in their conversations with Bullock that led her to believe that Mr. Pierce should lie. Thus, there was no evidence that Mrs. Pierce either (1) believed Bullock's alleged statements or (2) acted in reliance upon them.

Houston J., concurs.

APPENDIX B

85-722—*John Hancock Variable Life Ins. Co. v. Pierce*
85-745—*Curtis Bullock v. Pierce*

On Application for Rehearing

PER CURIAM.

John Hancock and Bullock apply for rehearing and argue again that the judgment of the trial court should be reversed on the same grounds argued on the original appeal. As to those issues argued on original appeal, and addressed by this Court in its opinion, the application for rehearing is due to be denied. Bullock also insists that this Court did not address in the original opinion the following question:

> "Whether the trial court erred in excluding from evidence the physical examinations for life insurance completed by plaintiff's decedent with a different company which contained misrepresentations similar to those made by the plaintiff and her deceased husband on the policy at issue in the case before this Court?"

Bullock is correct in stating that this Court did not address this specific question on original deliverance, but after examining the record and the briefs of the parties, we were of the opinion that the trial judge did not err in excluding these documents. Our examination of the record indicates that no proper foundation was laid for the introduction of the documents.

The original opinion in this case was released on September 25, 1987. On September 30, 1987, the trial judge issued an order in response to the remand under *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Harmon v. Motors Insurance Corp.*, 493 So.2d 1370 (Ala. 1986); and

Alabama Farm Bureau Mut. Cas. Ins. Co. v. Griffin, 493 So.2d 1379 (Ala. 1986). Both appellants filed applications for rehearing within the 14-day limit set by Rule 40, Ala. R. App. P., and after the entry of the September 30 order. We now also have a brief filed by counsel for the appellee, which argues the issues on rehearing as well as the merits of the trial judge's order on remand. We do not, at this time, rule on the issue of excessiveness of the verdict, but we adopt the following procedure to eliminate any future confusion over the briefing schedule on cases remanded under *Hammond*.

Our clerk has advised us that attorneys have frequently inquired whether an application for rehearing is appropriate when a case has been only remanded, as this one was. Because there is some confusion among the bar on this point, we take this opportunity to announce the following procedure to be used in cases remanded under *Hammond v. City of Gadsden*. When this Court remands a case to the trial court for entry of an order pursuant to the dictates of *Hammond*, this Court retains jurisdiction of the case, and its order issued at the time of remand is not final, for purposes of Rule 40, Ala. R. App. P. After return to the remand, the parties will be given an opportunity to file briefs challenging or supporting the *Hammond* order, after which this Court will issue a final judgment in the case. That judgment will be final for the purposes of Rule 40, Ala. R. App. P. On the application for rehearing, the parties may attack not only the original judgment of this Court, but the trial court's ruling on the damages issue as well, which is presented on the return to the remand.

Based on the foregoing, we are of the opinion that the application for rehearing is due to be denied.

OPINION EXTENDED; APPLICATION OVERRULED.

Maddox, Jones, Almon, Shores, and Adams, JJ.,concur.

Torbert, C. J., Beatty, Houston, and Steagall, JJ., concur, in part; and dissent, in part.

TORBERT, CHIEF JUSTICE (concurring in part and dissenting in part)

I agree with the extension of the opinion on rehearing setting forth the procedure for filing applications for rehearing in future cases that are remanded in accordance with *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). However, I dissent as to the overruling of the application for rehearing.

Beatty, Houston, and Steagall, JJ., concur.

APPENDIX C

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

APPENDIX D

§ 27-1-12. *Penalty for violation of title.*

Each willful violation of this title for which a greater penalty is not provided by another provision of this title or by other applicable laws of this state shall, in addition to any applicable prescribed denial, suspension or revocation of certificate of authority or license, be punishable as a misdemeanor, upon conviction, by a fine of not more than $1,000.00 or by imprisonment in the county jail, or by sentence to hard labor for the county, for a period not to exceed one year or by both such fine and imprisonment or hard labor in the discretion of the court. Each instance of violation shall be considered a separate offense. (Acts 1971, No. 407, p. 707, § 15.)

§ 27-12-23. *False statements, etc., in insurance application.*

No agent, broker, solicitor, examining physician or other person shall knowingly make a false or fraudulent statement or representation in, or relative to, an application for insurance. Violations of this section shall be punishable under section 27-1-12. (Acts 1971, No. 407, p. 707, § 249.)

(2)

No. 87-1535

In The

Supreme Court of the United States

October Term, 1987

JOHN HANCOCK VARIABLE LIFE INSURANCE COMPANY,

Petitioner,

v.

LOIS ANNETTE PIERCE,

Respondent,

OBJECTION TO PETITION FOR WRIT OF CERTIORARI

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—o—

STATEMENT OF THE CASE

In 1983, Curtis Bullock (hereinafter referred to as "Bullock"), was a soliciting agent for John Hancock Variable Life Insurance Company (hereinafter referred to as "John Hancock") and was authorized in that capacity to solicit applicants for insurance; to see that the applications were filled out with the information given to him by the applicant and to submit these applications to John Hancock for approval or rejection (RT, p.29).

On April 5th, 1985, Bullock came to the home of Glen D. Pierce (hereinafter referred to as "Mr. Pierce") and Lois

Pierce (hereinafter referred to as "Mrs. Pierce") and convinced them to cancel $110,000.00 in other life insurance policies, which policies had been in effect for approximately seven to eleven years on the life of Mr. Pierce and to in turn apply for a new policy in the amount of $200,000.00 from John Hancock. Bullock asked them certain questions from a non-medical application form, Part B, (Plaintiff's Exhibit 1-A) (CR, p. 33) concerning the health of Mr. Pierce and any prior problems or treatment that he had had.

Mr. and Mrs. Pierce both told Bullock in response to these questions that his health was not good since in the past he had had some chest pains, some breathing problems, diverticulitis, some alcoholic problems, as well as being treated by various doctors and hospitals. Even though Bullock read out each one of the questions on the non-medical application, had Mr. Pierce sign the form, dated it April 5th, 1983 and Bullock witnessed it, Bullock did not list any of the answers concerning the health problems which were told to him by Mr. and Mrs. Pierce (RT, p. 49).

In fact, Bullock told them that if all these problems were cleared up that's all that mattered and *"what they don't know wouldn't hurt them."* He also told Mr. and Mrs. Pierce that if all of these problems were cleared up, Mr. Pierce did not have to mention them to anybody because he had told Bullock and that was all that mattered since he represented John Hancock (RT, p. 49). Bullock told Mr. and Mrs. Pierce that he (Mr. Pierce) would have to have a physical by Dr. Allen but as long as they had told him (Bullock) about these problems, he represented John Hancock and there was no point in discussing them with Dr. Allen at the physical (RT, p. 73).

On receiving the application for insurance, John Hancock wrote to Ochsner Clinic and received a letter

report concerning the Plaintiff's health dated August 13, 1982 (CR, p. 196). In this report, Dr. Philip C. Young of the Ochsner Clinic pointed out that Mr. Pierce suffered from various problems and had been treated for them. These same medical problems were not listed on the medical application filled out by Dr. Allen and identified as Plaintiff's Exhibit No. 1-B. John Hancock admitted that before the said policy was approved for issuance it knew from examining the Ochsner's report and Dr. Allen's report that most of the information listed on Dr. Allen's report was incorrectly answered (RT, p. 133-135, but still issued the policy (CR, p. 231). John Hancock neglected to write to the personal physician of Mr. Pierce for any clarification until after Mr. Pierce died (CR, p. 434).

REASONS FOR DENYING THE PETITION

The question which John Hancock attempts to raise is whether the award of punitive damages in this case against John Hancock for the fraudulent acts of its agent, Bullock, violates the Constitution of the United States and particularly Amendments V, VI, and XIV.

By applying the well established standards for granting certiorari, the Respondent would submit that this petition should be denied because:

1. This particular question was not presented to or considered by the court below at any stage;
2. The alleged decision below is not in conflict with any other decision, State or Federal;
3. The alleged decision below is not inconsistent with prior decisions of this Court;

4. It is not essential that the Court resolve these constitutional questions now — indeed, it would be inappropriate to do so because the Legislature of Alabama has already considered and imposed solutions under the Tort Reform Act passed in June, 1987.

It is virtually undisputed that John Hancock did not cite or rely on any question of the Due Process Clause regarding punitive damages imposed upon it because of the actions of its agent at any state of the proceedings below. This Court has repeatedly said that it cannot and will not *"decide Federal Constitutional issues raised here for the first time on review of State Court decisions."* CARDINALE V. LOUISIANA, 394 U.S. 437, 438 (1969); DISTRICT OF COLUMBIA COURT OF APPEALS V. FELDMAN, 460 U.S. 462, 482 (1983); WEBB V. WEBB, 451 U.S. 493, 499 (1981); WILSON V. COOK, 327 U.S. 474, 483-484 (1946).

The only issue raised by John Hancock in the prior proceedings was whether *"the award of punitive damages in civil proceedings in Alabama violates the Constitution of Alabama and the Constitution of the United States."* Under this general statement, John Hancock chose to argue that punitive damages under Alabama Civil Procedure were criminal in nature and therefore violated its constitutional rights as to (A) self incrimination, (B) standard of proof beyond a reasonable doubt, (C) double jeopardy, (D) certainty in standard of conduct, and (E) certainty in standard of penalty. At no time did John Hancock ever contend that the imposition of punitive damages on it because of the actions of its agent, Bullock, deprived it of its due process rights under the Constitution of the United States.

It is conceivable that John Hancock could argue that the question which it now raises for the first time is merely an *"enlagement"* of its arguments made below and therefore it can come under the *"mere enlargement"* doctrine as set out in DEWEY V. DES MOINES, 173 U.S. 193 (1899). However, in the lower court, DEWEY, unsuccessfully argued that a tax assessment on lots owned by him as a non-resident, was *"the imposition of a personal liability against him in excess of the value of all the lots and therefore was not due process"* in violation of the 14th Amendment. In the Supreme Court he attempted to raise the related question of whether the assessment itself amounted *"to a taking of property without due process of law"*, because the assessment exceeded the value of the property. This Court rejected that attempt finding that DEWEY'S second due process question was not a mere *"enlargement"* of the due process question he had raised before even though he had specifically alleged all of the *"facts upon which the (second) question might have been raised"*, and even though he had specifically relied upon the Federal Due Process Clause in support of the question he did raise below.

Furthermore, the Petition should be denied because it is not essential that this Court resolve any such constitutional question at this time since most of these issues have been solved by the Alabama Legislature in its Tort Reform Act which became effective on June 11, 1987 (1987 Ala. Acts 185). Although the Tort Reform Act expressly states that it does not affect the rights of any person if such rights accrued prior to the effective date of the Act and therefore it would not apply to this present case, it does solve many, if not all these questions in the future. Some of the pertinent areas affected by the provisions of the Act include the following:

(A) Punitive damages may not be awarded in any civil action unless the standard of proof is by clear and

convincing evidence that the Defendant consciously and deliberately engaged in oppression, fraud, wantonness or malice (1987, Alabama Acts 185, Sec. 1);

(B) There is a cap placed on punitive damages in the amount of $250,000.00 unless the Plaintiff can prove one of three extremely difficult exceptions;

(C) A principal shall not be vicariously liable for punitive damages unless he or it either: (1) has knowledge of the unfitness of the agent, servant or employee; (2) fails to properly instruct the agent, servant or employee with a disregard of the rights or safety of others; (3) authorized or ratified the wrongful conduct; or (4) derived a benefit from the action of the agent, servant or employee. The Act goes on further to say that a Plaintiff may not recover punitive damages against a principal, master or employer (the Plaintiff) if he knowingly participated with the agent, servant or employee to commit fraud or wrongful conduct with full knowledge of the import of this Act.

In essence, it would appear that the Tort Reform Act limits punitive damages and particularly limits them in such areas of which John Hancock now complains where it was held liable for the acts of its agent, acting within his line and scope of his authority as such. Bullock was authorized to solicit applications, receive information and fill out applications. He did just that but recklessly or intentionally failed to write down the correct information. The Tort Reform Act further provides that a principal is held liable for its agent's conduct if the agent's conduct was *"calculated to or did benefit the principal . . ."* John Hancock certainly cannot contend in this situation that the act of Bullock

Bullock in soliciting and accepting applications for insurance was not calculated to benefit John Hancock since it was in the business of selling life insurance policies and collecting premiums.

John Hancock has urged this Honorable Court to issue this Petition of Certiorari to the Supreme Court of Alabama to *"preserve the issues herein pending this court's opinion in BANKER'S LIFE"*. To the contrary on examination of the issues presented in BANKER'S LIFE & CASUALTY CO. V. CRENSHAW, No. 85-1765, now on appeal, it is clearly seen that none of the issues in that particular case involved punitive damages awarded against a principal for the fraudulent acts of its agent.

This is simply a last ditch attempt by John Hancock to delay the payment of life insurance benefits which were due to Mrs. Pierce in 1983 and which John Hancock has wrongfully withheld for apprximately five years. John Hancock has retained and invested the sum of $200,000.00 for this period of time and has probably collected enough interest to more than pay the punitive damages awarded.

CONCLUSION

For the reasons stated above, the Respondent, LOIS ANNETTE PIERCE, would respectfully urge this Honorable Court to deny the Petition for a Writ of Certiorari as filed by the Petitioner, John Hancock.

Respectfully submitted,

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No. 87-1535

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's statement of the case asserts as uncontested facts that which at trial was contested by the parties, with minor exceptions. However, as this Petition for Writ of Certiorari is addressed only to legal issues concerning the award of punitive damages in Ala-

bama as violative of the Constitution of the United States, no further comment will be made as to Respondent's erroneous statement of the case.

———o———

REPLY TO RESPONDENT'S ARGUMENT

Respondent asserts four grounds for denying the Petition for Writ of Certiorari to the Alabama Supreme Court, and each will be discussed *seriatim*.

1. Respondent asserts that the question of the constitutionality of an award of punitive damages under Alabama law being violative of the Constitution of the United States "*was not presented to or considered by the Court below at any stage . . .*". That statement is pure misrepresentation by Respondent.

John Hancock Variable Life Insurance Company (hereinafter "John Hancock") asserted that an award of punitive damages against it would be a violation of the Constitution of the United States in its Amended Answer. (Clerk's Record [hereinafter "CR"], p. 41). John Hancock moved for a directed verdict for dismissal as to the claim of punitive damages on the fraud claim at the close of all the evidence on the ground that the claim for punitive damages was barred by the Constitution of the United States, (Reporter's Transcript [hereinafter "RT"], p. 320), which motion was denied. John Hancock then timely objected to the instructions given by the trial court as to the award of punitive damages based on a civil standard of proof to the "*reasonable satisfaction*" of the jury. (RT, pp. 329, 339).

After the jury returned a verdict against John Hancock on the fraud claim in the amount of $350,000, John Hancock timely filed a motion for judgment notwithstanding the verdict reasserting that the award of punitive damages was in violation of the Constitution of the United States. (CR, p. 110).

The Alabama Supreme Court itself noted that John Hancock raised the issue that the award of punitive damages in civil proceedings in Alabama violates the Constitution of the United States in both its original opinion, (Petition, App.A, p.3a), as well as in its opinion on John Hancock's application for rehearing. (Petition, App.B, p.13a). Clearly, the Alabama Supreme Court did not address these issues, though they were, in fact, raised by John Hancock.

Accordingly, this ground for denying the Petition for Writ of Certiorari is meritless.

2. Respondent asserts that the opinion below of the Alabama Supreme Court is not in conflict with any other state or federal decision. John Hancock has not asserted that such is the case except to advise that the issue has been raised before this Court in the pending case of *Banker's Life & Casualty Company v. Crenshaw, Supreme Court of the United States, No. 85-1765.* John Hancock is not relying on these considerations contained in Rule 17(b) of the Supreme Court Rules in support of its Petition for Writ of Certiorari, such that Respondent's arguments on this point are irrelevant.

3. Respondent argues that the opinion below of the Alabama Supreme Court is not inconsistent with prior

decisions of this Court. John Hancock has not alleged that such is the case, only advising that this issue is currently before the Court in *Banker's Life*. John Hancock is not otherwise relying on Rule 17(c), second clause, of the Supreme Court Rules as a basis for the Petition for Writ of Certiorari, such that Respondent's arguments are simply irrelevant.

4. Finally, Respondent argues that it "*is not essential that the Court resolve these constitutional questions now . . .*" because the Legislature of Alabama passed the Tort Reform Act on June 11, 1987, published at 1987 Ala. Acts 185. This argument is absurd.

The Act itself does not apply to claims which have accrued prior to its adoption, including the claim herein, and Respondent readily admits same. (Objection, p. 5). This argument is not only meritless, but irrelevant.

Respondent concludes her argument by stating that this Petition for Writ of Certiorari is "*simply a last ditch attempt by John Hancock to delay the payment of life insurance benefits which were due . . .*" and that "*John Hancock has retained and invested the sum of $200,000 for this period of time . . .*". These statements are a complete misrepresentation of the facts and the issues raised in the Petition for Writ of Certiorari.

By returning its verdict against John Hancock, the jury, by implication, found that the policy was not validly issued and no money was due under the policy. Damages in excess of the policy amount can only be punitive.

John Hancock has not sought a review of the judgment against it as to the compensatory damages awarded

by the jury, in the amount of $200,000. Moreover, John Hancock has never retained nor invested any sum of $200,000 for any period of time, having only received the life insurance premiums collected by its soliciting agent and forwarded to John Hancock. These misrepresentations by Respondent are clearly inappropriate in this forum.

———o———

SUBSEQUENT ACTIONS OF ALABAMA SUPREME COURT

John Hancock has, of necessity and pursuant to its terms, interpreted the opinion of the Alabama Supreme Court on application for rehearing (Petition, App.B, p.13a-15a) as a final order for purposes of petitioning this Court for a Writ of Certiorari. However, recent actions by the Alabama Supreme Court suggest that the opinion on application for rehearing dated December 11, 1987 is not interpreted as a final order by the Alabama Supreme Court.

Soon after John Hancock filed its Petition for Writ of Certiorari herein, it also filed a motion for stay of execution with the Alabama Supreme Court. By order dated April 18, 1988, the Alabama Supreme Court denied John Hancock's motion for stay of execution "*as being moot.*" (App., p1a). It would appear that the only grounds upon which said motion for stay of execution would be moot is if the Alabama Supreme Court considered its opinion on the application for rehearing dated December 11, 1988 a non-final order such that the proceedings therein were still under submission to that court.

John Hancock is unable to determine from the Alabama Supreme Court opinion on application for rehearing and its subsequent order of April 18, 1988 whether this case is still under submission to the Alabama Supreme Court. However, if such is the case, then John Hancock's Petition for Writ of Certiorari herein would be premature.

CONCLUSION

For the foregoing reasons, as well as those reasons set forth in John Hancock's Petition for Writ of Certiorari, we respectfully urge the Court to grant the Petition for Writ of Certiorari to the Alabama Supreme Court.

Respectfully submitted,

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APPENDIX

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

April 18, 1988

85-722	)	
John Hancock Variable Life	)	Mobile Circuit
	)	Court
v.	)	
	)	CV-83-002898
Lois Annette Pierce	)	

ORDER

The appellant having filed a motion for stay of execution, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the motion to stay of execution is denied as being moot.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 19th day of April, 1988.

/s/ Robert G. Esdale
Clerk,
Supreme Court of Alabama